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Supreme Court of the United States

OCTOBER TERM, 1943.

No. 313.

GEORGE W. GREEN ET AL., PETITIONERS,
VS.
CITY OF STUART, FLORIDA, RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

REPLY BRIEF FOR PETITIONERS.

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STATEMENT OF MATTERS AND QUESTIONS INVOLVED.

The brief for respondents opens with an assertion that the "Statement of Matters Involved" contained in the petition has distorted the facts as shown by the record and has intermingled argument with facts and has made so many gratuitous statements of fact which do not appear of record that counsel for respondents assumes the privilege of restating the case for the benefit of court. Their

statement of the case consists entirely of a statement of the chronology of the filing of various papers and documents constituting the record, together with certain extracts from the orders of the district court. We find no objection to their chronological statement saving in one particular. At page 7 of their brief counsel assert that a hearing had been previously set at Miami for September 14th, 1942, at which hearing

> "no creditor having appeared but these various objectors (meaning petitioners represented by Carroll Dunscombe) the court allowed the City to make out its *prima facie* (case) by affidavits. These affidavits were produced and the court actually manually signed the decree in Tampa three days later although the matter was adjudicated in Miami September 14th, 1942."

The record does not bear out these assertions. On the contrary the affidavits referred to are the affidavits of L. B. Eurit, City Clerk of the City of Stuart (R. 150 to 152) and the affidavit of Thomas M. Cook. It appears by the record (R. 152 and R. 155) that both of these affidavits were dated September 16th, 1942, and sworn to before a notary public on the same date. That date was *two days after* the supposed hearing in Miami and therefore the two affidavits were not in existence at that time. Furthermore R. 150 and R. 152 shows that the two affidavits were *filed* September 18th, 1942. That was four days after the supposed hearing at Miami and was the actual date of the interlocutory order in question as it appears R. 163. Therefore the record is plain that these affidavits were neither in existence nor considered at Miami but were filed before the court in Tampa. Thus it appears that the actual hearing and consideration of the affidavits as evidence to make out the City's supposed *prima facie* case was *ex parte* and at a different city and place from that stated in the advertisement as published R. 203 to 206. The record however shows that upon motion of petitioners (R. 178) to vacate the interlocutory order, Judge Holland

at Miami on October 16th, 1942 (R. 186), made an order denying that motion and reaffirmed Judge Barker's prior order to the effect that petitioners neither as creditors nor as property owners had any such status as entitled them to be heard on their answers or petitions of intervention. The two orders, the one by Judge Barker and the other by Judge Holland, showed that if counsel for petitioners had been on hand at Miami, Florida, on September 14th, or at Tampa on September 18th the result would not have been different and that brings us squarely face to face with the several questions embodied in the petition heretofore filed beginning page 16 thereof.

We regard it as most significant that while counsel for the respondents claim that our

> "Statement of Matters Involved has distorted the facts"

and so forth, they have not undertaken to point out any instance wherein there has been any such distortion or any error of fact in our entire Statement of Matters Involved. They have taken great pains to point out the chronology of events, and went wrong in one essential particular as already explained, but they wholly failed to even criticize our analysis of the petition for confirmation of the plan of composition or our analysis of the plan made part thereof or our analysis of the pleadings by the several petitioners or our analysis of the fiscal agency contract entered into between the City and Thomas M. Cook. Having remained silent with respect to all those matters the brief for respondent in effect concedes that the plan and the fiscal agency contract were subject to all the illegalities and criticisms leveled against the same. Moreover they do not undertake to defend the various illegalities of the proposed plan of composition or the illegalities of the fiscal agency contract. The gist of their argument is to the effect that conceding all the illegalities pointed out the petitioning creditors and property owners had no

right to be heard. That they were not affected by the proposed plan, illegal though it may have been in many respects. Moreover they contend that their condition was made better if anything and for that reason also they have no standing to make complaint. Such line of argument is fallacious because it assumes as true that which was to have been but was not demonstrated. The several questions I to XI inclusive, pages 16 to 37 of the petition filed here, presented definite reasons why under the facts and the law both the petitioning creditors and the petitioning landowners were injured by the plan as confirmed and why the courts below were in error in undertaking to confirm the same. We shall take the liberty of restating those questions, and point out briefly how counsel for respondents have utterly failed to answer the same.

ARGUMENT.

QUESTION I.

Were petitioners George W. Green and Newport Culvert Company such creditors of the City of Stuart as were severally affected by the "plan" of composition proposed by the City and were they severally entitled to contest the material allegations of the City's petition for confirmation of such "plan"?

At page 12 of respondent's brief counsel attack the claim of Green by pointing out that it has been the subject of contest in several decisions that went before the Court of Appeals and that the Bankruptcy Court should not be burdened with considering such defenses as the City may have. If the court wishes to glance at the four cited decisions in the Green case it will be found that 81 F. 2d 968 was an out and out decision in favor of Green based upon a solemn resolution of the City of Stuart which was in all respects affirmed and ratified by Chapter 14407, Laws of Florida, 1929. After remand the district court entered a judgment for Green on the promissory notes in question notwithstanding a jurisdictional objection raised by the City. On the second appeal, 91 F. 2d 603, the judgment of the district court in favor of Green was reversed on the jurisdictional point only. The holding was that because the notes of the City had been made payable to a named payee the endorsement in blank did not make them bearer obligations so as to entitle the transferee or assignee to sue in the federal court. Therefore the judgment on the merits was vacated for want of jurisdiction. 94 F. 2d 942 was simply a matter of taxing costs on the prior appeal. 101 F. 2d 309 involved only the question of whether after the reversal in 91 Fed. 603 the district court acted properly in vacating the judgment in favor of Green

which had been reversed. The holding was that since the judgment was wholly without jurisdiction same should be vacated. Thus after all four cases are considered the debt owned by Green still remains valid for reasons declared in *Green* v. *Stuart*, 81 F. 2d 968, though the declaration and finding of the court there made was without jurisdiction. Counsel for petitioners do not pretend to claim that Chapter 14407, Acts of 1929, has been repealed or that anything has happened to make the debt owned by Green unenforceable. That statute authorized the issuance of $210,000 of negotiable bonds of the City of Stuart to be issued for Green's claim and others making up that total amount and further that the City should pledge its full faith and credit for the payment of such funding bonds and that there should

> "be levied annually a special tax upon all the taxable property of said City over and above all taxes authorized or limited by the charter of said City sufficient to pay the interest and principal of said bonds as the same become due and payable."

Even if the Green claim had not been so liquidated the Bankruptcy Court had ample and exclusive power to approve the claim even if it had been owned by a resident of the City of Stuart. The term "security" as defined by 11 U. S. C. A., Sec. 402, includes bonds, notes, judgments, claims and demands "liquidated or unliquidated."

Attack is also made upon the claim of Newport Culvert Company with the suggestion that the City may have some valid defense but the unfortunate position of respondents in attacking the Green claim as well as the Newport Culvert claim is that they filed motions to strike those claims and the answers predicated thereon and those motions admitted as true the facts set out in those answers and claims.

Respondents next present what they call an analysis of *Poinsett Lbr. & Mfg. Co.* v. *Drainage Dist.*, 119 F. 2d 270, as not entitling either Green or Newport Culvert

Company to file their claims or answers or be heard with respect to the plan proposed by the City and the majority of its bond creditors. The claim made by opposing counsel bottom page 14 of our brief is not borne out by the decision nor indeed by the quotation found on that page said to be from the transcript of record. The matter arose upon a petition filed by the Lumber Company for leave to institute a damage suit against the drainage district in a state court notwithstanding the petition for composition which had been filed in the federal court. The Lumber Company contended that its claim for unliquidated damages dues to flooding was not "affected by the plan" and that the drainage district and its bondholders had not even named the Lumber Company as a creditor or one to be taken into account. Therefore the Lumber Company, according to the opinion of the court, was not mentioned in the petition for composition nor did the petition as quoted page 14 of respondent's brief say anything about that unliquidated claim or any other. The court however refused to grant a petition for leave to sue in the state court on the ground that though unliquidated the claim of the Lumber Company was a "security" within the meaning of 11 U. S. C. A., Sec. 402. That the Bankruptcy Court had exclusive jurisdiction to adjudicate that claim upon the petition for composition which had been filed. In short the conclusion was that the claim though not a bond claim or a promissory note claim was affected by the plan and upon being allowed would be *payable from the same source* as the obligations of the district represented by bonds or other "securities."

Still more directly in point is the case of *West Coast Life Ins. Co.* v. *Merced Irr. Dist.*, 114 F. 2d 654, 9 C. C. A., certiorari denied 311 U. S. 718, rehearing denied 312 U. S. 714. The 14th headnote of that case reads as follows:

> "The fundamental classification under bankruptcy law must be in accordance with the source or fund out of which the payment is intended to be

made. Bankr. Act, Sec. 83, sub. b, 11 U. S. C. A., Sec. 403, sub. b."

This was announced as being the law notwithstanding the California Statute under which a preference was claimed for certain bonds and coupons that had matured and had been presented for payment. The Ninth Circuit also held that the Bankruptcy Act was superior to all state laws on the subject. Therefore 11 U. S. C. A., Sec. 403(b), was controlling. In the case of *Taylor* v. *Provident Irr. District*, 123 F. 2d 965 (9 C. C. A.), certiorari denied 62 S. Ct. 914, the court reaffirmed the same doctrine as shown by the second headnote and supporting text. There cannot and is not any denial of the fact that the Green debt and the debt due to Newport Culvert Company were and are payable from the *same source* as the bonds claimed by those who joined in the petition for a plan of composition. Therefore by the express language of the statute they were of the same class as the bond creditors and were necessarily affected by the proposed plan irrespective of whether their debts were liquidated or unliquidated. It was not within the power of the City or its consenting creditors to ignore either the Green debt or the Newport Culvert Company debt because 11 U. S. C. A., Sec. 403(a), requires

> "There shall be filed with the petition a list of all known creditors of the petitioner, together with their addresses so far as known to petitioner, and description of their respective securities showing separately those who have accepted the plan of composition, together with their separate addresses, the contents of which list shall not constitute admissions by the petitioner in a proceeding under this chapter or otherwise."

The purpose of this requirement was that all might have due notice and an opportunity to be heard. A further provision of the same subsection of the statute is that

> "In case any controversy shall arise as to whether any creditor or class of creditors shall or shall not

> be affected, the issue shall be determined by the judge, after hearing, upon notice to the parties interested."

That section of the statute was not complied with because, as we have seen, there was no notice to counsel for Green or Newport Culvert Company that the motions to strike their claims and answers would be called up for hearing either at Miami or at Tampa. Subsection (b) of the same section provides that not less than ten days prior to the date for hearing

> "any creditor of the petitioner affected by the plan may file an answer to the petition controverting any of the material allegations therein and setting up any objection he may have to the plan of composition."

That is what these creditor-petitioners did, but their claims and answers were summarily stricken out on the assumption that they belonged in a different classification because they did not hold bonds or judgments based on bonds of the City. Such conclusion of the district court, affirmed by the Court of Appeals, was, we believe, a fundamental error that will vitally affect the proper administration of the Bankruptcy Law as applied to municipal bankruptcy compositions.

QUESTION II.

Were George W. Green, Robert M. Turner, A. T. Van Tassel, Pauline A. Selser et al., as taxpayers, some within the original corporate limits of the City and some within the extended but illegal limits of the City, severally entitled to intervene and show that the "plan" because of its bad faith, its unfairness, its waste of public funds and its illegalities should not be confirmed?

In response to this question counsel for respondent, pages 17 and 18, rely upon a district court decision in *In re Willacy County Water Control & Imp. Dist.*, 36 Fed. Supp. 36. That case cannot help respondents even if

it was a Court of Appeals decision, because there were two sets of land owners who sought to intervene. The first set, namely, Coats *et al.*, sought to intervene and attack in its entirety the corporate existence of the taxing district and to attack *in toto* the validity of all the bonds issued by the district. The court held that the intervention would not be permitted because the petition therefor was without merit and because it was barred by provisions of the state law. That under the state law only the State acting through the Attorney General could make such an attack either upon the district or its bonds. The other set of land owners, as shown by the 11th and 12th headnotes and supporting text, were permitted to intervene because the court concluded that the "plan" would materially injure their rights. Therefore respondent can get no comfort out of the Willacy case.

Respondent's counsel have not undertaken to answer the general proposition represented by *Crampton* v. *Zabriskie*, cited page 18 of our petition to the effect that any taxpayer always has a standing in a court of equity to complain and have relief against corporate authorities to prevent waste of corporate assets or an abuse of corporate power or the making of illegal contracts that purport to bind the taxing corporate entity. In this connection we find further aid in the second paragraph of U. S. C. A., Sec. 403(a). That part of the statute expressly provides that where the plan of composition affects special assessments levied against particular properties a list of the owners shall be filed with the petition

> "and such record owners or holders of title shall be notified in the manner provided in this section for creditors and be entitled to hearing by the court upon reasonable application therefor."

The obvious reason for that provision is that the liens against the lands of such abutting owners constitute a

> "special statutory trust"

as declared by the Supreme Court of Florida in the Winter Haven case quoted page 23 of our petition. Such abutting owners whose properties are thus encumbered are entitled to be heard as to how that fund is to be appropriated and used in the proposed plan. Section 8 of the proposed plan here involved (R. 21) does that very thing, namely, it proposes to illegally divert that fund to uses not authorized by the statute constituting the charter of the City providing for the levying of such special assessments. True it may be that no one of the intervening property owners set up specifically that he was such abutting property owner subject to such special assessments. Nevertheless the statutory provision cited is only one example of the manner in which property owners in the City may be affected and hence be entitled to a hearing. Another example is represented by the case of *Taylor* v. *Williams,* 142 Fla. 402, 195 So. 175. In that case a group of taxpayers filed a suit in equity attacking the validity of county and road district bonds previously issued and validated by a prior court decree. Part of the attack had to do with a so-called fiscal agency contract theretofore entered into with R. E. Crummer & Company which increased the burdens represented by the bonds under attack. The Supreme Court of Florida found certain parts of that refunding contract and the basic resolutions of the County Commissioners relating thereto void and contrary to Section 6, Article IX, of the State Constitution. Said the Supreme Court:

> "Such provisions being organically illegal are not made valid by validating proceedings and the taxpayer may challenge such organic invalidity."

In the instant case the petitioners, all taxpayers now before this court as petitioners, pointed out the same sort of illegalities in the refunding bonds which were to constitute a part of the composition plan and the same sort of illegalities in the fiscal agency contract made with Thomas M. Cook. Therefore they had a perfect right under the

decision in *Taylor* v. *Williams* to intervene pursuant to Rule 24 of Civil Procedure Rules and have their attacks considered by the court. Instead, they were summarily dismissed by the district court and its decision was affirmed.

As another example we cite the case of *Hughes* v. *Town of Davenport,* 141 Fla. 382, 193 So. 292. In that case Hughes and other taxpayers of the Town of Davenport filed a suit in equity to enjoin taxes levied against their lands. The situation there was a close parallel to what the petitions of these taxpayers here undertook to present. The Hughes case was also a close parallel with the record made in the companion suit of *Selser* v. *City of Stuart,* No. 314, now pending here. In a prior quo warranto suit similar to *State* v. *City of Stuart,* 120 So. 335, a judgment of ouster had been entered excluding certain territory from the corporate limits of the town. Nevertheless the town authorities continued to levy taxes on the excluded area on the theory that such area was bound to respond for debt service on bonds issued under the Special Act of 1925 prior to the judgment of ouster. The Supreme Court of Florida held in the first place that former validation proceedings with respect to such bonds did not determine what lands were within the corporate limits subject to the payment of the bonds. That whenever it was determined by the quo warranto suit that the lands in question were not legally within the corporate limits, such lands were not subject either for past or future assessments for debt service purposes. In the instant case, as shown by the pleadings of the landowning petitioners here and as shown by the bill in the Selser case, the City notwithstanding the judgment of ouster in *State* v. *City of Stuart,* continued to levy taxes on the excluded areas and the City secured special acts at the 1937 session and the 1939 session of the Legislature undertaking to confirm and ratify the levies so made in such outlying territories. The plan which was presented

to the court below, especially section 8 thereof, contemplates and provides that delinquent taxes against all such areas may be collected and then utilized to buy back refunding bonds from Thomas M. Cook at the prices stated in that section of the plan. Thus again the properties of these intervening property owners and the properties owned by others in all such areas are directly involved in this plan and the pretended liens against their properties are a part of the very subject-matter which the plan of composition purports to pledge for the support of the new bonds. The Supreme Court of Florida in the Hughes case squarely held that such taxpayers and property owners were entitled to attack such a scheme by a bill in equity. Therefore the inescapable conclusion that they were entitled by petition of intervention to be heard in this proceeding. It is a mandatory requirement of 11 U. S. C. A, Sec. 403(e), that the court shall not only find that the plan is fair and equitable and that it complies with the provisions of that chapter of the Bankruptcy Law but also that

> "The petitioner is authorized by law to take all action necessary to be taken by it to carry out the plan."

This last clause makes it obligatory upon the court to hear and determine the various questions of illegality presented by the petitions of the land owners now before the court including the illegal attempt to pledge taxes against their lands for the payment of the new bonds.

The amendment to the Municipal Bankruptcy Provisions came under review and was sustained by this court in *U. S.* v. *Bekins,* 304 U. S. 27, 82 L. Ed. 1137. The amended act was sustained on the ground that unlike the first Act, it preserved and did not interfere with the fiscal or governmental affairs of the states or their political subdivisions. The court also specifically held as shown by the 4th headnote (L. Ed.) and supporting text that the clause now found in 11 U. S. C. A., Sec. 403(e)(6),

"manifestly refers to the law of the state."

It follows therefore that when a proposed plan of composition such as now before the court includes a proposal to substitute refunding bonds for all outstanding bonds and judgments against the City the responsibility is placed upon the bankruptcy court to ascertain and determine whether or not the proposed refunding bonds are authorized by state law, including the statute which constitutes the charter of the City. Substantially the same situation was before the Ninth Circuit Court of Appeals in the case of *West Coast Life Ins. Co.* v. *Merced Irr. Dist.*, *supra*. In that case proceedings were already pending in the state courts of California for a composition of the bonded indebtedness of the irrigation district in accordance with the rules defined by the state law. Nevertheless it was held as pointed out in the 5th, 6th, 16th and 17th headnotes and supporting text that whenever the Bankruptcy Court accepted the petition of the district and the required number of its creditors for federal composition the jurisdiction of the Bankruptcy Court thereupon became exclusive. This means, when coupled with the decision in the Bekins case just mentioned, that the Bankruptcy Court had exclusive jurisdiction to determine whether the composition plan was legal and to determine the legality of proposed refunding bonds, but in reaching such determinations the court must have regard to the powers vested in the taxing entity under state law and under the state constitution. Under Question XI, pages 35 to 38 of our petition, we pointed out that the exclusive character of federal jurisdiction precluded the prosecution of a validation suit with respect to the proposed new bonds in a state court during and while the bankruptcy proceeding was in progress. The decision in the Merced Irrigation District case certainly sustains that proposition. Nevertheless the state statute dealing with the subject of validating bonds again aids in determining when property

owners should be entitled to intervene in a composition proceeding such as this. Section 5107, Compiled General Laws of Florida, 1927, being a part of the statute relating to the validation of bonds, expressly provides that upon the filing of a petition to validate a notice addressed to taxpayers and citizens of the taxing entity shall be duly published stating the time and place for a hearing and requiring them to show cause

> "if any they have why said bonds or certificates should not be validated and confirmed."

All the taxpayers and citizens of the City of Stuart had the same interest in this composition plan which included a proposal to issue over one million dollars of refunding bonds in lieu of all outstanding bonds and judgments that they would have had if the validation proceeding had been properly brought in the state court. Nevertheless the district court and the Court of Appeals held otherwise and struck all pleadings interposed by the property owners who are now petitioners before this court.

We may also point out that the last amendment to 11 U. S. C. A., Sec. 403(e), now found in the pocket supplement page 88, makes it imperative that the court guard against fraudulent practices. Property owners of any affected taxing entity are most vitally interested in preventing fraudulent practices such as the statute sought to guard against and hence that constitutes another strong reason why they should be permitted to intervene and aid the court in ferreting out fraudulent practices if any are attempted.

The provisions of 11 U. S. C. A., Sec. 403(e), were designed to forestall and prevent any such fraud being perpetrated upon the public. On page 17 of the brief for respondent two prior decisions of the Fifth Circuit are cited in support of the argument that the jurisdiction of the Bankruptcy Court in proceedings of this sort is very limited. Neither of those cases has any application. The

Ware case, 128 Fed. 2d 114, simply held that when the proposed plan of composition failed the Bankruptcy Court had no further jurisdiction and therefore could not order any distribution of municipal funds that might have been accumulated while the proposed plan of composition was pending. The same thing was held in the Leco Properties case. Such holdings are probably correct applications of the statute but even so they do not answer the contention here made on behalf of creditors and property owners as applied to a proposed plan which was not abandoned but which the court undertook to approve and confirm.

QUESTION III.

Was the plan "fair and equitable" either to creditors such as Green et al., or taxpayers such as Turner et al., when it was shown by the answer of Green (R. 95) **that the citizens' committee plan** (R. 98 to 108) **would have accomplished a refunding of the City's debts for $500,000 less than the Cook-Crummer plan** (R. 13-33)?

The respondent stands mute as to this question. No attempt is made to deny or explain what was said in the answer of Green (R. 95) as to there being a difference of a half million dollars between the Citizens' Committee plan and the Cook-Crummer plan. It needs no argument to show that such very great difference in the result of the two plans is a matter which vitally concerns both the minority creditors and property owners of the City whoever they may be.

The record also shows (pages 86 to 91) that petitioner Green through his counsel propounded a set of interrogatories to the Mayor of the City of Stuart, among them the following:

> "(5) Please state how it is for the better interests of the taxpayers you refuse to proceed under an accepted plan that will lessen the municipal debt some $500,000?

"(24) Please state if Thomas M. Cook or his employees did not state Cook & R. E. Crummer controlled the City debt and unless they or Cook were permitted to handle the refunding no plan would be approved.

"(25) State that as a matter of fact you were afraid that if you didn't allow Cook to handle the refunding it could not be accomplished."

"(33) If this plan costs the City $500,000 more than your first accepted plan, how do you arrive at the conclusion it is of no cost to the City, or does it cost the City $500,000 and put Cook in a position to demand a large fee as a condition to exchange."

A similar set of interrogatories was propounded to the fiscal agent Thomas M. Cook (R. 139 to 142). No. 13 (R. 141) was as follows:

"(13) Please state how you arrive at the conclusion your plan of composition is at no cost to the petitioner when it costs the petitioner some $500,000 more than its own accepted plan."

The courts below did not welcome any light on these questions. At any rate the record shows that the claim and answer of Green and other petitioners here were stricken out and that the court did not require any answers to the above quoted interrogatories or any others propounded to the Mayor and Cook. The pleadings of the petitioners which were stricken out by the orders of the district court and the unanswered interrogatories warrant the inference that there was *coercion* exercised by Crummer and his representative Cook in forcing the fiscal agency contract and their refunding program on the City. Also that they used the provisions of the Bankruptcy Act as a club to get what they wanted from the City and from minority creditors. Also that they used the proceedings in the bankruptcy court to put over their plan and enable them to make large profits in speculating upon the securities of the City. The Municipal Bankruptcy

Act was not enacted for any such purposes. On the contrary this court in *U. S.* v. *Bekins,* 304 U. S., text 51, 82 L. Ed., text 1144, quoted the report of the Judiciary Committee to the effect that one of the purposes of the Act was to enable financially embarrassed taxing entities

> "to meet their creditors under necessary judicial control and guidance and *free from coercion* and to affect such adjustment on a plan determined to be mutually advantageous" (Italics ours).

This general purpose of the Act was reinforced and further safe-guarded by the amendment of March 4th, 1940, now found in 11 U. S. C. A., Sec. 403 (e), pocket supplement, page 88. It follows therefore that the courts below committed grievous error in closing the door against such inquiries.

QUESTION IV.

Was the City "authorized by law to take all the action necesary to be taken by it to carry out the plan" when that plan was contrary to many limitations of the City's existing charter?

The brief for respondent is silent also as to this question. Counsel does not pretend to claim that the City had power to issue over $1,000,000 of refunding bonds without any ordinance and without any election when the City Clerk's affidavit shows that the entire assessed value of all the taxable property the City *claims to be subject* to taxation amounts to only about $650,000 more than the bonded debt. We have already called attention to *U. S.* v. *Bekins,* 304 U. S., text 49, to the effect that 11 U. S. C. A. 403(e)(6) means that the composition plan must be in accordance with state law and that means in this instance in accordance with the City's statutory charter. This court in the Avon Park case emphasized the same proposition for in the last paragraph of the opinion in that case, 311 U. S. 149, referring to the section of the Statute last mentioned, the court said:

"the court must be satisfied that the city 'is authorized by law to take all action necessary to be taken by it to carry out the plan' before it may enter a decree of confirmation. Plainly that finding could not be made if it was clear, for example, that a taxpayer could enjoin the issuance of the new bonds or the levy of assessments therefor."

QUESTION V.

Was the City "authorized by law" to carry out the plan when the provisions of Section 8 of the plan (R. 21-22) **violated sundry sections of the City's charter of 1925 and of the City's charter of 1933?**

The brief for respondent is silent as to this question.

QUESTION VI.

Was the plan either "fair and equitable" to petitioning creditors and taxpayers or was the plan "authorized" by the City's charter when it was proposed to convert into interest-bearing bonds all noninterest-bearing bonds all noninterest-bearing coupons and "other interest" but to allow the holders of 25% in amount of refunding bonds to cause a reverter to the old interest rate of 6% upon any default by the City occurring, such refunding bondholders however to retain all interest-bearing new bonds issued for noninterest-bearing coupons and "other interest"?

The brief for respondent contains no comment whatsoever on this question. It simply asserts that the findings of the courts below close the door on all such inquiries and that neither creditors nor property owners had any right to be heard or to raise any of the questions presented by the petition for writ of certiorari. The discussion under Question VI presented by the petition shows that the Cook-Crummer plan operated to *increase* the bonded indebtedness of the City greatly over what the face thereof previously showed because they put into the form of interest-bearing bonds a large accumulation of

non-interest-bearing coupons and then compounded the interest on the coupons. This was part of the means whereby the difference of $500,000 arose between the Citizens' Committee plan and the Cook-Crummer plan. Such method of increasing the bonded indebtedness of the City was prohibited not only by the rule quoted from the Fieldhouse case, page 25 of the petition, but also by the limitations contained in Section 158 of the City's charter quoted page 20 of our petition.

QUESTION VII.

Was the district court authorized to confirm the plan without any specific findings as to the City's ability to perform and carry out the plan and without any investigation or findings as to what property was subject to taxation, especially when these petitioners had their pleadings sought to put such matters in issue?

The brief for respondent is silent as to this question. They do not even make any comment with respect to the case of *Kelley* v. *Everglades Drainage District,* 87 L. Ed. (adv.) 1091, although that case was decided since the decision by the Court of Appeals now under consideration. They assume that the City and its consenting creditors consisting of the Crummer outfit had only limited use for the power of the Bankruptcy Court. Apparently all they wanted was to secure a confirmation order to the end that they might be able to speedily market the refunding bonds at a big profit on the representation that they had the full approval of the federal bankruptcy court. The position which their argument takes is that if taxpayers have any complaint as to the lands levied upon for those new bonds or as to the illegality of the fiscal agency contract or as to any lack of power under the City charter or otherwise they are privileged to start such litigation as they see fit in the state court whereas under the law as explained in *U. S.* v. *Bekins* and in the Avon Park case and in the Kelley case the Bankruptcy Court cannot ac-

cept the responsibility of such a case and do the job by halves leaving a Pandora's Box of litigation to follow. In the case of *West Coast Life Ins. Co.* v. *Merced Irr. Dist.*, 114 F. 2d 679, first column, it appears that a scientific study of the taxpaying ability of the irrigation district was made and that the study represented about nine months of intensive work, whereas in this case the courts below refused to make any inquiry of that sort and refused to entertain any pleadings by creditors or property owners which would go into that subject.

QUESTION VIII.

Was it competent for the district court to confirm the plan when illegal favoritism appeared on the face of the plan and when "fraudulent practices" on the part of the fiscal agent Cook (representative of R. E. Crummer & Company) were shown by the petitioners' pleadings and the contract attached to the petition of Van Tassel (R. 167 to 177)?

The only even indirect attempt to answer this question is the general statement of alleged distortion of facts and gratuitous statement of facts found in the first sentence of respondent's brief plus the alleged inflammatory and highly untrue and prejudicial matters complained of bottom page 19, but even in closing (top page 20) they say they will not attempt to answer such matters. We assume that they may have some reference to something said in support of Question VIII of the petition but if so they studiously avoided pointing out definitely what their complaint is based upon. The observations in support of Question No. VIII contained in the petition are based upon the record and the places of the record are cited with respect to each matter. It seems to us that if a speculating bond-house concern can get away with such a program as put over with respect to the City of Stuart then Congress has failed in its purpose of trying to safe-

guard honest composition plans for financially embarrassed public entities.

QUESTIONS IX AND X.

Was the plan accepted and approved by qualified creditors holding two-thirds of the debts affected?

Was the offer and acceptance of the plan in good faith?

No comment is made in the brief for respondent as to these two questions.

QUESTION XI.

Did the district court as a court of bankruptcy have exclusive jurisdiction and power to consider and determine all questions relating to the proposed plan of composition, including what property was subject to ad valorem taxation and whether the proposed refunding bonds would be valid and enforceable obligations?

This question was presented pages 35 to 38 of the petition heretofore filed. We have since the filing of the petition in this case filed a reply brief in *Selser et al.* v. *City of Stuart*, Case No. 314. The Selser case has to do primarily with the subject-matter of Question XI above stated. We respectfully refer the court to the reply brief in the Selser case as supplementing and supporting the observations made in the petition with respect to Question XI.

In the further support of the point that it was incompetent for the City to prosecute the validation proceeding of the proposed refunding bonds in the state court while the proceeding for composition of its indebtedness was pending in the federal court, we again cite *West Coast Life Ins. Co.* v. *Merced Irr. Dist.*, 114 F. 2d 654 (9 C. C. A.), certiorari denied 311 U. S. 718, 5th, 6th, 15th and 17th headnotes and text supporting the same. The validity and the authority of the City to issue such refunding bonds

was part of the very subject-matter over which the federal court then had jurisdiction pursuant to 11 U. S. C. A., Sec. 403(e)(6). The City had petitioned for an injunction against all actions brought against it and an injunction order had been granted to that effect. See petition (R. 209) and order (R. 215). That petition and order were filed and made upon the theory that the federal court had exclusive jurisdiction as to all matters relating to the plan or the proposed refunding bonds including the validity and power to issue said bonds.

Conclusion.

We find in the conclusion of respondent's brief the contentions repeated that creditors Green and Newport Culvert Company were in no manner affected by the composition proceedings. That contention has been answered by each and every one of the eleven questions presented by the petition and reviewed in this reply brief. They contend further that the property owners Pauline A. Selser, Gosling, Turner, Van Tassel and others were not affected by the composition proceedings and therefore not entitled to intervene, but that in any case they were represented by the City itself. That argument is wholly unsound as pointed out under the several questions hereinbefore discussed, especially so when it is pointed out that the City authorities were under pressure and coercion exercised by the Crummer-Cook majority group of bondholders. If the City or any other such taxing unit represented the taxpayers making it improper for them to intervene in such a case then the whole theory of such statutes as the Florida statute on the subject of validating bonds and providing notice to property owners who may come in and defend is all wrong. Again, such cases as Hughes v. *Town of Davenport, supra*, are all wrong. Also *Taylor* v. *Williams, supra*. Again it is claimed in the conclusion of respondent's brief that the position of all the petitioners is not changed in any manner except that they are now better off than before. This is a barefaced assertion with-

out any support from the record and it is contrary to all of the specific observations pointed out in the petition and in this brief to the contrary under the several Questions I to XI inclusive.

We have examined the several cases cited bottom page 15 of respondent's brief and so far as we can tell they have no relevancy to this question or to any other contention made in this case. The only possible benefit that can be claimed for the City is a temporary reduction in interest rates, whereas that benefit, according to section (F) of the plan (R. 18) and according to section 5 (2) of the fiscal agency contract (R. 172) has a 25 percent-option string tied to it, and according to the record the Cook-Crummer outfit holds that string. The net result, according to the record is that the City now has a very much larger bonded debt than it had before, with no increased ability to pay. Therefore the City and its property owners and general creditors have gained nothing, whereas the fiscal agent and those with whom he is associated have gained much by the speculations permitted.

It is now respectfully submitted that the questions presented by the petition in this case and reenforced by this brief are of great public importance in the matter of the proper construction and application of that part of the Bankruptcy Act which relates to municipal corporations. If the municipal amendment to that Act is to perform the remedial purposes designed by Congress the matters complained of in this case should be corrected.

Respectfully submitted,

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